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5 UNITED STATES DISTRICT COURT
6 FOR THE WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 TERADATA CORPORATION, TERADATA
9 US, INC., and TERADATA OPERATIONS,
10 INC.

11 Plaintiffs,

12 v.

13 SAP SE, SAP AMERICA, INC., and SAP
14 LABS, LLC,

15 Defendants.

MISC NO. 2:20-mc-0074 RSM

**PLAINTIFFS' MOTION TO COMPEL
DISCOVERY FROM MICROSOFT
CORPORATION**

**NOTE FOR MOTION CALENDAR:
September 11, 2020**

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PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM
MICROSOFT CORPORATION

MISC. NO. ____

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Pursuant to Rules 37 and 45 of the Federal Rules of Civil Procedure and Local Rule 37(a)(1) of the Western District of Washington, Teradata Corporation (“Teradata”) moves to compel Microsoft Corporation (“Microsoft”) to produce documents responsive to Requests for Production Nos. 1-5, 7, and 9 of Teradata’s Subpoena to Produce Documents, Information, Or Objects or to Permit Inspection of Premises in a Civil Action to Microsoft Corporation.

I. INTRODUCTION

On May 22, 2020, Teradata served Microsoft with a subpoena requesting 11 categories of documents needed for Teradata’s antitrust claims against SAP SE, SAP America, Inc., and SAP Labs, LLC (collectively, “SAP”). (*See Exhibit 1.*)¹ After three months of negotiations, Microsoft has outright refused to produce any documents at all for many of the requests and refused to commit to producing documents for the other requests at issue. Microsoft’s only production to date was a mere 22 pages of nonresponsive, publicly-available, decades-old press releases. Teradata has patiently tried to resolve this with Microsoft, but time is running out.

SAP has engaged in anticompetitive conduct to stifle competition from Teradata and gain a monopoly position with respect to certain data analytics software both companies sell. SAP claims that it is not, and could not become, a monopolist because of competition from Microsoft and other suppliers of the products underlying Teradata’s antitrust claims. Teradata needs certain limited information from Microsoft to show that, while Microsoft obviously is a leading supplier for a variety of products, it is not a major competitor in the relevant antitrust market SAP seeks to monopolize.

With this motion, Teradata seeks to compel production of documents responsive to only seven document requests, as narrowed by Teradata during negotiations to try to reach agreement. Those requests seek specific promotional and marketing plans; competitive assessments regarding specific potential competitors; certain information about specific Microsoft customers; and certain

¹ Teradata is not currently moving on Request Nos. 10 and 11 since Microsoft has agreed to comply with those requests. Teradata also is not currently moving on Request Nos. 6 and 8.

documents, including communications with customers and internal to Microsoft, regarding specific anticompetitive licensing practices SAP has adopted and that are at the core of Teradata's antitrust claims against SAP. These categories of documents are routinely provided in discovery in antitrust cases, including from nonparties, and Teradata cannot obtain them from other sources. As Dr. Kostis Hatzitaskos explains, the documents are needed for important economic analyses routinely performed in antitrust cases.²

Again, after three months of negotiations, Microsoft has provided no indication of what, if anything, it is willing to produce for the requests at issue, while refusing to produce anything for most of the requests. Microsoft has responded with boilerplate objections and incredible, unsubstantiated burden claims—such as claiming that, as a leading technology company, it has no ability to conduct electronic searches internally of employees' email and electronic files. Microsoft should be required to produce responsive documents immediately.

II. BACKGROUND

A. The Teradata-SAP Litigation

Teradata is the plaintiff and counter-defendant in a lawsuit pending against SAP in the Northern District of California. Teradata is pursuing claims for trade secret misappropriation and antitrust violations, as explained below. **Exhibit 2.** The documents Teradata seeks here are relevant to its antitrust claims against SAP.

B. The Relevant Teradata and SAP Products

i. ERP Applications

SAP sells Enterprise Resource Planning ("ERP") Applications, which are business management software solutions that capture a variety of data, such as transactions, raw materials, production capacity, purchase orders, payroll, and customer relationships. Very few providers offer integrated suites of ERP Applications that can meet the needs of large enterprise customers,

² This motion is supported by the Declaration of Kostis Hatzitaskos (hereinafter "Hatzitaskos Decl.").

1 because of the need to scale efficiently and handle the volume, diversity, and complexity of
 2 information produced and collected by those customers. **Exhibit 2, ¶¶ 59-70.** SAP has a
 3 dominant position among these few providers with its S/4HANA suite and legacy ERP
 4 Applications. **Exhibit 2, ¶ 70.** Switching between ERP providers is difficult, expensive, and
 5 risky, creating a “lock-in” effect that reinforces SAP’s dominance. **Exhibit 2, ¶¶ 65-69.**

6 ERP Applications are connected to underlying databases that hold the data collected and
 7 created by the applications. These “transactional” databases are designed to efficiently and
 8 accurately collect and store information in real time in an organized fashion. They are
 9 traditionally not designed to perform analytics, as doing so can lead to disruptions and
 10 inefficiencies in their transactional functions. Instead, data from transactional databases have
 11 traditionally been replicated and transferred to specialized analytic databases. **Exhibit 2, ¶ 72.**

12 ii. **EDAW Products**

13 Teradata provides enterprise data analytics and warehousing products (“EDAW
 14 Products”). Analytic databases range in size and capability, from “data marts” that are designed
 15 for a single business function, to EDAW Products designed for a wide range of disparate
 16 information. EDAW Products are particularly important for large enterprises that collect a
 17 substantial amount of diverse information from sources such as ERP Applications. These
 18 companies rely on EDAW Products to efficiently harmonize, organize, store, and ultimately
 19 retrieve information that may be in different formats, languages, or currencies, or highly technical
 20 in nature. **Exhibit 2, ¶ 75.** These enterprises also often have very large volumes of data that
 21 require EDAW Products to scale effectively. Only a few companies have the ability to provide
 22 EDAW Products that can handle the complexity and scale required for large enterprises. Teradata
 23 historically was a leading and innovative company in the EDAW Product market—but it has come
 24 under attack from SAP, which has engaged in anticompetitive conduct.

25 C. **SAP’s Anticompetitive Conduct**

26 Teradata’s claims arise from SAP’s efforts in recent years to use its dominant position in

1 the ERP Applications market to pursue a similarly dominant position in the EDAW Product
 2 market, in which it previously had no presence. In 2008, SAP, under what Teradata now knows to
 3 be false pretenses, entered into a joint venture to combine SAP's ERP Applications suite and
 4 Business Warehouse reporting tool (SAP BW) with Teradata's industry-leading EDAW products.
 5 In fact, this was a ruse for SAP to steal Teradata's trade secrets and use them to develop a
 6 competing product: SAP HANA.

7 Customers have traditionally mixed and matched EDAW Products with ERP Applications
 8 according to what best suited their needs—similar to using non-Microsoft software products with
 9 its Windows operating system. **Exhibit 2, ¶¶ 80-81.** Teradata's success as a leading EDAW
 10 supplier has depended on this freedom of choice in the marketplace. SAP has attacked that
 11 freedom. **Exhibit 2, ¶ 83.**

12 SAP's first iteration of HANA had little success in the EDAW market. Low adoption rates
 13 and customer complaints highlighted HANA's deficiencies. **Exhibit 2, ¶¶ 86-87.** Unable to
 14 compete on the merits, SAP began coercing customers into using HANA, to the exclusion of
 15 Teradata and other third-party EDAW Products, by forcing ERP customers to adopt HANA in
 16 exchange for purchasing or merely upgrading SAP's ERP Applications—thus tying two distinct
 17 products together. **Exhibit 2, ¶¶ 89-91.** SAP announced that it will no longer upgrade previous
 18 ERP Applications and will sunset maintenance for previous iterations, thereby forcing its ERP
 19 customers to upgrade to S/4HANA and thus buy HANA. **Exhibit 2, ¶ 93.**

20 SAP also has begun significantly restricting competitors' ability to access customers' own
 21 data in SAP ERP Applications. This makes it costly, inefficient, or impossible for customers to
 22 move or replicate this data to a third-party database, such as Teradata, without breaching its
 23 license with SAP—something they previously had freedom to do with their own data. **Exhibit 2,**
 24 **¶¶ 90, 95-98.** Instead, SAP requires customers to upgrade to a much more expensive version of
 25 HANA before allowing for efficient access. The combination of tying HANA to S/4HANA and
 26 implementing these restrictions makes it cost prohibitive to use a third-party EDAW Product.

1 Through this conduct, SAP has deliberately sought to exploit its large, existing ERP
 2 customer base to the detriment of those and other customers, by stifling competition from
 3 Teradata. Because SAP's ERP customers are effectively locked into using its ERP Applications,
 4 SAP is now attempting to leverage that substantial market power to lock them into using only
 5 HANA in the EDAW Product market.

6 **D. Microsoft's Role in the Relevant Markets**

7 Microsoft provides both ERP Applications and EDAW Products. Its ERP Applications
 8 consist of a suite of products under the Microsoft Dynamics brand. Microsoft touts that it has "a
 9 large in house consulting team with over 400 years of experienced ERP Implementations." See
 10 <https://abouttmc.com/erp-system/>. SAP claims that Microsoft competes with SAP for ERP
 11 customers. **Exhibit 3** at 13.

12 Microsoft also offers EDAW Products, most prominently Microsoft SQL Server and
 13 Microsoft Azure SQL Data Warehouse. Its EDAW Products often draw data from SAP ERP
 14 Applications, meaning Microsoft is directly affected by SAP's conduct. SAP contends that
 15 Microsoft's EDAW Products compete with SAP's HANA and Teradata's EDAW Products.
 16 **Exhibit 4** at 4.

17 **III. LEGAL STANDARD**

18 "[D]iscovery in antitrust litigation is most broadly permitted and the burden or cost of
 19 providing the information sought is less weighty a consideration than in other cases." *New Park*
 20 *Entertainment L.L.C. v. Electric Factory Concerts, Inc.*, 2000 WL 62315, at *4 (E.D. Pa. January
 21 13, 2000) (quoting *United States v. Int'l Bus. Mach. Corp.*, 66 F.R.D. 186, 189 (S.D.N.Y.1974)).
 22 See also *In re Aspartame Antitrust Litigation*, 2008 WL 2275531 (E.D. Pa. May 12, 2008) (noting
 23 that the "broad scope of discovery 'has been held to be particularly appropriate in antitrust
 24 cases.'") (quoting *In re Intel Corp. Microprocessor Antitrust Litig.*, 2007 WL 137152 at *5 (D.
 25 Del. Jan 12, 2007)). Rule 45 subpoenas "may obtain discovery regarding any nonprivileged
 26 matter that is relevant to any party's claim or defense and proportional to the needs of the case."

1 *Robertson v. Catholic Cmty. Servs. of W. Wash.*, 2020 WL 3433143 (W.D. Wa. June 23, 2020)
 2 (applying Fed. R. Civ. P. 26(b)(1) standards to Rule 45 subpoenas).

3 Objections to discovery requests “must be specific—not []generalized, boilerplate
 4 objection[s].” *Jones v. Hernandez*, 322 F.R.D. 411, 413 (S.D. Cal. 2017) (citing *Burlington N. &*
 5 *Santa Fe Ry. Co. v. U.S. Dist. Ct. for the Dist. of Mont.*, 408 F.3d 1142, 1147 (9th Cir. 2005)). *See*
 6 *also Brown v. Warner*, 2015 WL 630926, at *6 (W.D. Wash. Feb. 12, 2015) (quoting *Cable &*
 7 *Computer Tech., Inc. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997))
 8 (compelling production for failure to show that request was “overbroad or unduly burdensome”).
 9 “The party who resists discovery has the burden to show that discovery should not be allowed, and
 10 has the burden of clarifying, explaining, and supporting its objections.” *Id.* at *1. *See also Opico*
 11 *v. Convergent Outsourcing, Inc.*, 2019 WL 3067202 at * 2 (W.D. Wash. Jul. 12, 2019).

12 **IV. ARGUMENT**

13 **A. Request Nos. 1-2 (Promotional and Marketing Plans)**

14 These requests seek promotional materials and marketing plans³ identifying whom
 15 Microsoft deems to be competitors in the relevant markets for ERP and EDAW products and how
 16 it positions its products against its primary competitors. Such documents are needed to define the
 17 relevant markets here and to assess market power. *See Med. Ctr. at Elizabeth Place, LLC v.*
 18 *Premier Health Partners*, No. 3:12-cv-26, 2013 WL 3872077, at *6 (S.D. Ohio July 25, 2013)
 19 (finding that “surveys, analyses, or studies...regarding competition” to be relevant to antitrust
 20 claims and ordering their production under Rule 45). *See also Todd v. Exxon Corp.*, 275 F.3d 191,
 21 205 (2d Cir. 2001) (“Industry recognition is well established as a factor courts consider in defining
 22 a market.”) The U.S. Department of Justice, Antitrust Division’s model discovery requests for
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 24

25 ³ In discussions with Microsoft, Teradata agreed to limit this request by agreeing not to request product roadmaps or
 26 product development plans. See the Declaration of David Cross in support of this motion (hereinafter “Cross Decl.”),
 ¶ 4.

antitrust cases seek these same documents. *See* DOJ Model Requests, Nos. 11 and 17, available at <https://www.justice.gov/atr/file/706636/download>.

Microsoft has important information about the relevant markets that is not available from Teradata's own files, SAP, or public sources. **Hatzitaskos Decl.**, ¶ 5. SAP claims the relevant markets include many competing products, including Microsoft's products, such that SAP cannot possess monopoly power or pose a dangerous probability of obtaining monopoly power in either market. Microsoft's assessments of competition, including of its own competitive position, regarding the relevant products are needed to respond to SAP's defense. For example, Microsoft's competitive assessments may identify only a small set of products that pose significant competition for its own ERP and EDAW products. Similarly, its documents may show that certain customers demand specific product offerings that only a limited set of competitors can provide. Economists routinely rely on such information for market definition and assessments of market power. **Hatzitaskos Decl.**, ¶ 5. And again, so does the Department of Justice.

Microsoft claims that Teradata is attempting to "shift the burden of conducting its own market analysis" to Microsoft. **Exhibit 5** at 4-5. Not so. Teradata has not asked Microsoft to perform any analysis; it seeks only a limited set of documents prepared in the ordinary course of Microsoft's business already sitting in its files.

Microsoft also objected to these requests with boilerplate and other meritless objections, such as claiming that it does not understand what "promotional materials" and "competitive assessment or evaluation" mean. **Exhibit 5** at 3-4. Microsoft's burden objection fares no better, completely lacking any specification or substantiation.

B. Request Nos. 3-4 (Competitive Assessments and Specific Customer Information)

Request No. 3 seeks documents showing how Microsoft has performed in competition with a limited set of potential ERP and EDAW competitors. Request No. 4 seeks limited information regarding Microsoft's top 100 ERP and EDAW customers by revenue, such as the product versions those customers are using. These requests seek important information on how customers

1 choose among potential key competitors in the relevant markets. *See Amer Needle Inc. v. New*
 2 *Orleans*, No. 04 C 7806, 2012 WL 4327610, at *1 (N.D. Ill. Sept. 21, 2012) (granting motion to
 3 compel third party’s license agreements and royalty and sales data as relevant to market definition
 4 and market power for antitrust case). Understanding whether and how customers switch between
 5 potential competitors, including Microsoft, is necessary to assess the extent to which ERP
 6 customers are locked in with their suppliers and view products as substitutes for one another.

7 **Hatzitaskos Decl.**, ¶ 5.

8 Request No. 4 also seeks information necessary to calculate market shares, which courts
 9 regularly consider for evaluating market power in antitrust cases. *See, e.g., Kerwin v. Cage Fury*
 10 *Fighting Championships*, Civ. No. 14-5159, 2015 WL 5092976, at *1 (E.D. Pa. Aug. 28, 2015)
 11 (“Requests calculated to discover agreements, restrictions on competition, defendants’ market
 12 share, and the essential nature of casinos in the market are within the scope of discovery.”).
 13 Courts have compelled non-parties to produce such information—and much more—in antitrust
 14 cases. *See, e.g., In re Androgel Antitrust Litig. (II) v. Unimed Pharms., LLC*, 2012 WL 12895205
 15 (N.D. Ga. Mar. 29, 2012) (compelling non-parties to produce “all purchase and sales data,”
 16 “comparative analyses,” and contracts with major customers).

17 Microsoft responded to these requests with similar boilerplate and other meritless
 18 objections, such as claiming it does not know what “wins and losses of sales” are or what it means
 19 that customers “switched away” from one supplier to another. Microsoft also claims that Request
 20 No. 3 asks it to “create documents that do not otherwise exist” in an attempt to “disguise an
 21 interrogatory as a request for production.” **Exhibit 5** at 6. Again, however, Teradata seeks only
 22 existing documents—specifically, those reflecting Microsoft’s wins and losses, including “the
 23 product and supplier the customer switched away from and identification of the product and
 24 supplier it switched to.” Microsoft does not claim—nor could it—that no documents exist
 25 reflecting the requested information.

Microsoft also objects to these requests as seeking “discovery of matters that can be obtained more conveniently...e.g., from publicly available sources or parties in this lawsuit.” **Exhibit 5** at 6, 8. This objection ignores the substance of the requests, which seek certain nonpublic information about Microsoft’s customers and its own sales to them, including wins and losses of sales of the relevant products. Even if there is some overlap between publicly-available information and what Microsoft has in its own files (which Microsoft claims without support), this does not relieve Microsoft of producing the nonpublic documents that Teradata needs. Courts have recognized that, “[p]ractically, there is no way for the plaintiff to frame its request to eliminate the possibility of duplication and at the same time ensure that it receives all of the documents it seeks from third parties.” *New Park Entertainment L.L.C. v. Electric Factory Concerts, Inc.*, 2000 WL 62315, at *4 (E.D. PA. January 13, 2000). Teradata has narrowly framed its requests and seeks documents that are unavailable from other sources.

Finally, Microsoft objects to these requests as “over broad and unduly burdensome” and “call[ing] for electronically stored information from sources that are not reasonably accessible.” **Exhibit 5** at 6-8. Again, Microsoft has provided no facts or specifics of any kind to support these sweeping, boilerplate objections. Nor do the objections seem to hold merit on their face given the ease with which sophisticated companies like Microsoft typically can collect and produce responsive information from central databases that track such information. *See Crocs, Inc. v. Effervescent, Inc.*, 2017 WL 3888502, at *3 (D. Colo. Feb. 8, 2017) (“[t]he Federal Rules clearly require the production of information from dynamic databases”). *See also Johnson v. Kraft Foods N. Am., Inc.*, 238 F.R.D. 648, 656 (D. Kan. 2006) (ordering production of contents of databases). In fact, Microsoft sells several tools that companies use to track this very information, such as Microsoft Excel, Microsoft Access, and Microsoft Dynamics applications. Microsoft does not deny that it likewise tracks the requested information internally.

1 **C. Request Nos. 5, 7, and 9**

2 These requests seek documents concerning the anticompetitive conduct at the center of
3 Teradata's claims: the restrictions SAP implements through its S/4HANA and HANA licensing
4 practices. These restrictions unlawfully limit consumer choice by restricting the ability of SAP
5 customers to transfer their own data between ERP Applications and EDAW Products. Microsoft
6 has outright refused to produce any documents responsive to these requests, insisting that Teradata
7 rely on documents available from SAP. **Exhibit 6.** But SAP obviously does not have Microsoft's
8 own internal documents or customer communications.

9 Request No. 5 seeks documents related to communications between Microsoft and SAP
10 regarding these license restrictions.⁴ Teradata of course is obtaining what it can from SAP. But
11 this request includes Microsoft's own internal communications concerning SAP's anticompetitive
12 licensing restrictions, which again are not available from SAP. Such communications are likely to
13 contain Microsoft's internal assessments of the impact of SAP's licensing restrictions on
14 Microsoft and its customers. SAP claims its products are innovative and that its licensing
15 restrictions do not affect the competitive process. Microsoft's documents likely will refute that
16 claim given the harm SAP has caused in the marketplace already. Moreover, given the narrow,
17 specific subject matter, these documents are unlikely to be voluminous or difficult to search for
18 and produce. Teradata has suggested three key custodians who are likely to have responsive
19 documents and identified a group of specific products to focus on, thereby significantly reducing
20 any burden on Microsoft. **Exhibit 7**, July 3, 2020 email from Mary Kaiser to Ben Byer; July 13,
21 2020, email from Mary Kaiser to Ben Byer.

22 Request No. 9 seeks documents recognizing restrictions SAP places on exporting data
23 from SAP ERP Applications to Microsoft products. This complements Request No. 5 by
24

25 ⁴ As part of a global resolution across the requests at issue, Teradata agreed to narrow this request to forgo documents
26 generally about SAP's HANA or S/4 HANA products and limit it to documents about SAP's licensing restrictions and
a specific subset of products.

1 capturing other internal Microsoft documents recognizing the impact of SAP's licensing
 2 restrictions on Microsoft and its customers. SAP obviously does not have these documents.

3 Request No. 7 seeks documents concerning communications with other competitors,
 4 customers, and any government authority regarding SAP's licensing restrictions on S/4HANA and
 5 HANA. This includes, for example, customer complaints that only Microsoft has. These
 6 documents are relevant to demonstrate SAP's harm to competition, which is a key consideration in
 7 Teradata's case against SAP. *See Med. Ctr. at Elizabeth Place, LLC v. Premier Health Partners*,
 8 No. 3:12-cv-26, 2013 WL 3872077, at *5 (S.D. Ohio July 25, 2013) (finding a nonparty
 9 competitor's information relevant to the "marketwide impact of the challenged conduct on
 10 competition" in antitrust case and ordering production of communications with others). *See also*
 11 **Hatzitaskos Decl.**, ¶ 5.

12 Microsoft asserted the same boilerplate, unsupported objections of overbreadth, ambiguity,
 13 and burden. **Exhibit 5** at 8-9, 11-12, 14-15. Teradata's requests are specifically targeted at a
 14 single topic at the core of its antitrust claims and SAP's anticompetitive conduct: specific SAP
 15 licensing restrictions. Microsoft also again purports not to understand common terms such as
 16 "changes to...business practices," "business relationship," "any customer," "any competitor," and
 17 the "interoperability or the integration" of the relevant products. It simply is not credible that
 18 Microsoft does not understand what a customer or competitor is, including in the context of
 19 antitrust litigation, with which it has extensive experience. Moreover, terms such as
 20 "interoperability" and "integration" are common in the context of the ERP Application and
 21 EDAW Products at issue, as they refer to the ability to transfer data from ERP Applications to
 22 EDAW Products. Teradata's request uses these terms in the specific context of SAP's licensing
 23 restrictions, with which Microsoft is very familiar through its own business relationship and
 24 interactions with SAP.

CERTIFICATION

Pursuant to L.R. 37(a)(1), the undersigned certifies that counsel for Teradata has in good faith conferred with counsel for Microsoft in attempts to resolve any disputes concerning the scope of the requests for production. Teradata has spoken or offered to speak to Microsoft's counsel on several occasions to come to an agreement on the scope of discovery, but the parties have been unable to reach an agreement. **Cross Decl.** Because the parties' efforts to resolve these issues have been unavailing, Teradata now seek intervention by the Court

DATED this 27th day of August, 2020.

Respectfully submitted,

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